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August 13, 2021

VIA ELECTRONIC FILING

Mr. David Butler  
Chief Hearing Officer  
Public Service Commission of South Carolina  
101 Executive Center Drive, Suite 100  
Columbia, SC 29210

Re: Applications of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC for Approval of Smart Saver Solar as Energy Efficiency Program

Docket Nos. 2021-143-E & 2021-144-E

Dear Mr. Butler:

On behalf of Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP" and together with DEC, the "Companies"), I am requesting a Hearing Officer Directive consolidating and amending the procedural schedules provided in the Notices of Hearing and Prefile Testimony Letters issued on July 27, 2021 in the above-referenced dockets. The Companies understand that there can be challenges in scheduling hearings; for that reason, this request does not propose to change the hearing date. However, the original schedule creates fundamental due process concerns for the Companies and does not adequately take into account timelines for discovery and motions set by the Commission's regulations, or provide adequate time to evaluate other parties' testimony, issue discovery, receive discovery, and utilize information obtained in discovery into rebuttal testimony.

The original schedule and the schedule proposed by the Companies are as follows:

Current Schedule (assuming consolidation)		
9/7/2021		DEC/DEP Direct Testimony
9/21/2021	14	ORS/Intervenor Direct Testimony
9/28/2021	7	DEC/DEP Rebuttal Testimony
10/5/2021	7	ORS/Intervenor Surrebuttal Testimony
10/26/2021	21	Hearing (virtual)

Proposed Schedule		
8/20/2021		DEC/DEP Direct Testimony
9/10/2021	21	ORS/Intervenor Direct Testimony
10/1/2021	21	DEC/DEP Rebuttal Testimony
10/11/2021	10	ORS/Intervenor Surrebuttal Testimony (upon motion and showing that surrebuttal is warranted)
10/26/2021	15	Hearing (virtual)
11/9/2021	14	Proposed Orders



In order to give not only the Companies but all parties more time in the case so that a fulsome record is presented to the Commission, the Companies have proposed filing direct testimony significantly earlier to allow more time in the schedule while preserving the Commission hearing date. The Companies note that the Applications were filed in April, and the Companies have been answering discovery for some time.

The Companies believe that amending the original procedural schedules will provide additional time for the Companies—as well as other parties—to review, evaluate, and propound discovery on prefiled testimony. Specifically for the Companies, while the Applications—which lay out the Companies’ basic positions—will have been pending for more than four months when other parties file their direct testimony, the Companies would have had only one week to review and evaluate the other parties’ testimony, prepare and propound discovery—which would be impossible given the twenty-day discovery timeline—and then prepare and file rebuttal testimony.

The Companies also believe that adequate time should be retained between the filing of surrebuttal testimony and the hearing as surrebuttal testimony will need to be reviewed and evaluated, and it may warrant discovery and motions on the testimony given the narrow scope and purpose of surrebuttal testimony. The requirement of S.C. Code Ann. Regs. 103-829(A) that motions, apart from those made during hearings, be reduced to writing and made at least ten days before the hearing indicates that there should be meaningful and sufficient time between when testimony is filed and the hearing begins. While the Companies have reduced this time from the Commission’s original schedule, for the purposes of this case, the Companies believe that the amount of time proposed is workable should surrebuttal be warranted and permitted by the Commission, particularly if surrebuttal testimony is as limited as it is supposed be. However, the Companies believe that any surrebuttal testimony should be accompanied by a motion for leave to file surrebuttal testimony, and that the motion must affirmatively demonstrate that the testimony is being proffered in response to new matters injected into the case for the first time in the Company’s rebuttal testimony pursuant to South Carolina case law.<sup>1</sup> The Companies respectfully request that such instruction be given in the Hearing Officer Directive requested herein.

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<sup>1</sup> See Order No. 2021-357 at 2, Docket No. 2005-83-A (May 18, 2021) ([T]he opportunity to present surrebuttal testimony is discretionary with the Commission. Such testimony should be limited only to new information in the company’s rebuttal testimony. [E]ven if surrebuttal testimony is allowed, which would be discretionary with the Commission, the issues raised in such testimony should also be limited.”) (citing *Palmetto Alliance Inc v South Carolina Public Service Commission*, 282 S.C. 430, 319 S.E. 2d 695 (1984)) (emphasis added); *State v. Watson*, 353 S.C. 620, 623–24, 579 S.E.2d 148, 150 (Ct. App. 2003) (quoting 88 C.J.S. *Trial* § 197 (2001)) (“Surrebuttal is appropriate when, in the judge’s discretion, new matter or new facts are injected for the first time in rebuttal . . . .”) (emphasis added); *U.S. v. King*, 879 F.2d 137, 139 (4th Cir. 1989) (“Surrebuttal evidence, though rarely offered, is admissible to respond to any new matter brought up on rebuttal. Whether the rebuttal evidence was a new matter is left within the discretion of the trial judge.”) (emphasis added); *Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors, Inc.*, 99 F.3d 587 (4th Cir. 1996) (concluding that defendant “could have requested surrebuttal” had it been surprised or prejudiced by plaintiff’s testimony); *James v. Comm’r of Correction*, 74 Conn. App. 13, 22–23, 810 A.2d 290, 295–96 (2002) (internal citations omitted) (“The defendant must demonstrate some compelling circumstance and the proffered evidence must be of such importance that its omission puts in doubt the achievement of a just result. Thus, the petitioner bears the burden of persuasion



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The Companies' proposed amendments to the schedule: (1) provide additional time for other parties to prepare testimony following the filing of DEC's and DEP's direct testimony; (2) provide the same amount of time for the Companies to prepare rebuttal testimony; (3) defer to and retain the hearing date established by the Clerk's office; (4) provide a proposed order deadline to facilitate a prompt resolution of the dockets; and (5) underscore and rely upon relevant jurisprudence establishing that surrebuttal is limited and discretionary. The Companies believe that the revised schedule improves the procedural fairness of the proceedings, particularly given how long the Companies' Applications have been pending, while also providing for an efficient disposition of these dockets.

As explained above, the Companies request a Hearing Officer Directive consolidating and amending the procedural schedules as set forth above.

By copy of this letter we are serving the same on the parties of record.

Kind regards,

Sam Wellborn

C: Parties of Record (via email)  
Heather Shirley Smith, Deputy General Counsel (via email)

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that surrebuttal is warranted."); *Cruse v. State*, 588 So. 2d 983, 990 (Fla. 1991) ("The decision to allow or disallow surrebuttal evidence rests within the sound discretion of the trial judge.").